

Supreme Court, U. S.

FILED

NOV 14 1975

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. **75-7151**

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

JESSE RODRIGUEZ, SADRACH G. PEREZ and MODESTO HERRERA,
on Their Own Behalf and on Behalf of Those Similarly Situated,
Respondents,

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

ERNEST HERRERA, TRINE PRIBE and MARIO MELCHOR,
Respondents,

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE,
ARTURO RODRIGUEZ and ELIAS GONZALEZ,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
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Petitioner, Southern Conference of Teamsters, (hereinafter "Southern Conference"), respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above related

and consolidated cases on November 25, 1974 (Petitions for Rehearing denied upon August 18, 1975).

The facts of these cases and the questions presented here are, in important respects, substantially similar and related to those presented in *International Brotherhood of Teamsters v. United States of America* (Application pending, No. 75-636, October Term 1975).

OPINIONS BELOW

The opinions of the Court of Appeals in the cases at bar are reported, respectively, at 505 F.2d 40 (*Rodriquez*), 505 F.2d 66 (*Herrera*) and 505 F.2d 69 (*Resendis*). The opinions are reproduced in the Appendix hereto (App. pp. A-13-67, 74-78, 87-94).¹

The Trial Court's respective Findings of Fact and Conclusions of Law and judgments, all dated March 22nd, 1973, in these cases which were tried *seriatim* in San Antonio, Texas, are reproduced in the Appendix beginning at (App. pp. A-1-12, 68-73, 79-86).

JURISDICTION

The respective judgments of the Court of Appeals herein were entered upon November 25, 1974. (App. pp. A-95-100). As noted, the Southern Conference and employer Appellees (East Texas Motor Freight, Yellow Freight System, Inc. and Leeway Motor Freight, Inc.) filed Petitions for Rehearing which were denied by order entered August 18, 1975. (App., pp. A-101-06). This Petition for Certiorari is filed 90 days within the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

¹ The Appendix hereto is presented in an appended volume, designated "App."

QUESTIONS PRESENTED

1

Does the mere existence of a statistical imbalance in racial composition of employees in a particular job classification justify a court's disregard of the legal standard for proof of an individual claim of discrimination, as defined by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and the Sixth Circuit in *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974)?

2

Where a finding of discrimination by an employer in original employment is a necessary pre-requisite to a finding of violation of Title VII and 42 U.S.C. § 1981, may an appellate court "accord no weight" to an evidentiary stipulation between all parties at trial that alleged discriminatees were not discriminated against in their original employment?

3

Does a union violate Title VII of the Civil Rights Act of 1964, as amended,² and 42 U.S.C. § 1981, solely by the establishment and continuation of a seniority system which provides job seniority from date of entry into the bargaining unit, where the union proposes seniority from the date of discrimination for employees who have been discriminatorily excluded from the bargaining unit by the employer?

² 42 U.S.C. §§ 2000c, *et seq.*

Does a union violate Title VII and 42 U.S.C. Section 1981 by negotiating a seniority system, neutral in its origin and on its face, which supposedly "locks-in" employees to city motor carrier jobs, where in fact the parties have stipulated at trial that the employees claim that their employer has refused to consider their request to transfer, and the seniority system thus has no effect in excluding such employees from "road" motor carrier jobs?

STATUTORY PROVISIONS

Section 703, (a) through (j) (42 U.S.C. § 2000e-2 (a)-(j)), of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 are reproduced in the Appendix (App. pp. 107-110).

STATEMENT OF THE CASE

A

Nature of the Cases

The cases at bar, characterized by the Fifth Circuit as "carbon copies," were all brought as private actions under Section 706 of Title VII of the Civil Rights Act of 1964, as amended.

Although these cases are private actions, we have previously said that they raise questions substantially related to those presented in *International Brotherhood of Teamsters v. United States of America* (No. 75-636, October Term 1975). The fil-

ing of these related petitions, along with that to be filed in *International Brotherhood of Teamsters v. Oliver I. Sabala, et al.*, 516 F.2d 1251 (5th Cir. 1974), reflects upon the serious and recurring nature of the questions for which review is sought.

In each case, with exceptions not relevant here,²² plaintiffs who were "city" motor freight employees for their various employers contended that they had been discriminatorily denied "road" motor freight jobs by their employers, and also variously complained of "no transfer" practices by the employer and the seniority systems in effect at their terminals pursuant to collective bargaining agreements.

At trial, plaintiffs entered into stipulations which narrowed their claims as against the employers and unions involved and substantially reflected upon evidentiary considerations. Thus, in the *Resendis* and *Herrera* cases, plaintiffs stipulated that their claims of discrimination were "based upon the fact that after their original employment they had been 'locked-in' to the lower paying job of city driver and denied a job as a line (road) driver because of (a) The maintenance of separate seniority rosters for city and line drivers; (b) The fact that any city driver regardless of his race, if he transfers from city driver classification to road driver classification loses his accumulated city driver seniority; (c) Prior to the filing of the EEOC charges by the Plaintiffs in this lawsuit, the availability of line driving jobs was not made known to these Plaintiffs; (d) The Defendants discouraged and ignored inquiries from the Plaintiffs concerning the qualifications and/or availability of line driving jobs." Similar stipulations were made in *Rodriguez*.

²² In *Resendis v. Leeway Motor Freight, Inc., et al.*, Arturo Rodriguez alleged that he had been discriminatorily fired as a "road" motor freight employee in 1972 and Wilburn White (a black) contended that he had been discriminatorily denied hire as a "city" employee since 1967. The Fifth Circuit affirmed the trial court's denial of both claims.

In *Resendis* and *Herrera*, the plaintiffs further stipulated that "plaintiffs were not discriminated against as defined by Title VII of the Civil Rights Act of 1964 insofar as their original employment with (the employer) is concerned." Again, an almost identical stipulation was made in *Rodriguez*.⁴

As noted by the Fifth Circuit herein, and as reflected by the undisputed record evidence as well, the responsibility for hiring plaintiffs and initial assignment of job classifications rested solely with their respective employers. Similarly, the union entities involved (Southern Conference and Teamsters Local 657) had nothing to do with the institution and application of the "no-transfer" policies, absolutely prohibiting transfer between city and road job classifications, applied to plaintiffs at various times by the employers here involved.⁵

Thus, the plaintiffs' claims and the Fifth Circuit's opinions herein were restricted, as to the union entities involved, solely to consideration of a theory of "lock-in" discrimination by the contractually-created seniority system governing job bidding and lay-off rights of road and city motor freight employees. (App. pp. A-54-57, 77, 93).

⁴ The stipulation in *Rodriguez* was:

MR. WEISS: "The parties stipulate that the plaintiffs were employed at the San Antonio Terminal of East Texas Motor Freight without regard to race, color or national origin.

THE COURT: That means, Mr. Weiss, the original employment?

MR. WEISS: Yes, that's right, your Honor. Yes, sir, that's right, Your Honor."

⁵ Employer Leeway Motor Freight, Inc. abandoned its "no-transfer" policy in 1971. (App. p. A-92).

B

Undisputed Facts as to the Seniority System

Plaintiffs were, at all relevant times, city motor freight employees of their respective employers, located at terminals in San Antonio, Texas. At the time of the "original hire" of each plaintiff by his respective employer, the employers had had no road operations or terminals in San Antonio, and employed no road motor freight employees there. As we have noted, plaintiffs thus uniformly (and accurately) stipulated that they were not discriminated against in their original employment as city employees at their employers' San Antonio terminals.

The terms and conditions of employment, including wages, hours and seniority rights for city and road motor freight employees of the respective employers here involved are set out in various and separate collective bargaining agreements which cover, respectively, city employees on the one hand and road employees on the other. There are separate road and city agreements between each individual employer and autonomous local unions affiliated with the International Brotherhood of Teamsters for each location at which an individual employer has road and/or city operations. These separate contracts, covering respectively road on the one hand and city employees on the other, have developed for wholly non-discriminatory reasons.

Under the afore-mentioned collective bargaining agreements, city motor freight employees are those performing the various functions necessary to operation of a local pick-up and delivery freight service (local drivers, dockmen, checkers, etc.). Road employees, are exclusively long-haul drivers. Under the contracts which define their terms and conditions of employment, city employees are all paid the same hourly wage, slightly higher than that paid to road employees. Fringe benefits for the two groups of employees (city and road) are identical. City em-

ployees have a weekly guarantee of 40 hours, with time and a half and in some instances double time for hours per week over that figure. Road employees have no weekly guarantee and do not receive premium pay for overtime work. Despite the absence of a weekly hour guarantee, many road employees nevertheless have an opportunity to earn a larger annual salary than that paid to city employees by working longer hours (up to seventy [70] hours per week). At the same time, of course, road employees must bear many of their own living expenses incurred out of town, work longer hours and are away from their homes and families for many days at a time. Thus, while road employment generally affords employees the opportunity for higher earnings, many employees choose and prefer to do city work. In no sense is there a "line of progression" from city to road jobs, nor can city jobs (affording an average yearly earning of more than \$13,000) be characterized as "low-paying" or "menial."⁶

The seniority rules at issue,⁷ negotiated into contract supplements following negotiation of a "Master Agreement" applicable nationwide⁸ provide for separate job bidding and lay-off seniority for city motor freight employees and road motor freight employees of the respective employers.

Historically, both because of patterns of organization of motor freight employees and because of decisions rendered by the National Labor Relations Board, there have existed separate collective bargaining units for road motor freight employees on the one hand and city motor freight employees on the other. One of the results of this historical pattern of separate collective bar-

⁶ See discussion p. 19 *infra*.

⁷ The seniority rules involved here are identical to those in *International Brotherhood of Teamsters v. United States of America* (No. 75-636, October Term 1975).

⁸ The National Master Freight Agreement.

gaining units has been the development of separate collective bargaining agreements covering city employees on the one hand and road employees on the other. These agreements, like those in the instant case, have provided for job bidding and lay-off seniority for all employees within the particular road or city bargaining unit beginning with the date of entry of the particular employee into that bargaining unit. Employees in both the city and road job classifications have historically and continuously preferred this separation of road and city job bidding and lay-off seniority.

The seniority system requires that, when an employer permits an employee to transfer between the road and city job classifications, the employee maintains his company seniority for fringe benefit purposes but assumes job bidding and lay-off seniority in his new job only from the date of employment therein. The uncontradicted evidence at trial was that the foregoing seniority rules "apply to all job applicants and employees (in the respective job classifications) regardless of race or qualifications." (App. pp. A-4, 70, 82). Thus, any city employee, whether Anglo, Mexican-American or Black,⁹ upon moving to a road job is required to give up his city job bidding and lay-off seniority and assume road job bidding and lay-off seniority only from the date of entry into the road bargaining unit and job classification.

The foregoing seniority system, including the rules governing job bidding and lay-off seniority, has never been used by union entities to deny to individuals discriminatorily denied employment in the road (or for that matter the city job classifications) job bidding and lay-off seniority from the date they would have been employed in such a classification "but for" unlawful discrimination against them. To the contrary, union entities and particularly those involved here have consistently insisted upon

⁹ Again, city employment is good employment, and, unlike other instances in other industries, this unit is not limited to minorities.

application of a "rightful place" seniority concept to those individuals who allege and prove discriminatory denial of employment in, *inter alia*, the road motor freight employee classification.

C

The Trial Court's Decisions

Based upon the trial stipulations and the above-recited evidence, and in conformance with the rules subsequently enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the trial court dismissed plaintiffs' claims concerning the contract seniority system, holding that it violated neither Title VII nor 42 U.S.C. 1981. (App. pp. A-12, 73, 86). Denying plaintiffs' application for a class action in *Rodriguez*, the trial court treated all three cases as identical and found:

- (a) "It is stipulated that none of the plaintiff employees were discriminated against as to their original employment;"
- (b) "The named plaintiffs had not properly applied for road jobs and were in any event not qualified therefor;"
- (c) "The existence of separate contracts and separate job bidding and lay-off seniority for city and road drivers was reasonable 'as an accepted business practice and by the fact the National Labor Relations Board recognizes the two job groups as separate bargaining units';"
- (d) Contract provisions providing for separate job bidding and lay-off seniority for city and road drivers "applied to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory;"
- (e) As a matter of law union defendants had not "violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination." (App. pp. A-12, 73, 86).

D

The Court of Appeals' Opinions

In reversing the trial court, the United States Court of Appeals for the Fifth Circuit used the vehicle of "class action" considerations and an overall statistical showing wholly to obscure and thus to nullify the trial court's findings that individual plaintiffs had failed to prove their claims of discrimination.

Concluding summarily that *Rodriguez* was a proper class action under Rule 23,¹⁰ and reversing the trial court's holding to the contrary, the Court concluded that statistics reflecting a disparity between Anglos on the one hand and Blacks and Mexican-Americans on the other in East Texas Motor Freight's Texas road driving force "established a prima facie case of past discrimination in hiring" which had affected plaintiffs. The Court applied similar logic, based on overall statistical evidence, to the *Herrera* and *Resendis* cases, to conclude that plaintiffs there had been discriminated against *even though these latter actions were not brought as class actions*.

In all three cases, the Court declined to apply the standard established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802 (1973), requiring that a complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination by showing that he (i) made proper application and (ii) was qualified for a job in which (iii) a vacancy existed. The Fifth Circuit also rejected, for purposes of determining seniority relief, the Sixth Circuit's adoption of a formula requiring actual application for road employment (or a filing of a charge with the Equal Employment Opportunity Commission), along with the existence of a vacancy and possession of qualifications to be a road driver as a basis for awarding seniority relief. See

¹⁰ We defer to East Texas Motor Freight's petition, seeking review in *Rodriguez*, as to presentation of argument concerning "class action" considerations.

Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974). Thus, the trial court's undisputed findings that plaintiffs (a) had sought employment only in San Antonio, where no road jobs existed; (b) had not made proper applications for road jobs and (c) were in any event not qualified for road employment were completely disregarded upon appeal.

Similarly, the Fifth Circuit made short shrift of plaintiffs' stipulations, in conformance with the afore-cited findings of the trial court, that they "were not discriminated against in original employment" when they were hired in San Antonio as city drivers. Wrote the Fifth Circuit: "We accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal as city drivers," contending that the stipulation did not foreclose simultaneous discrimination against plaintiffs in "their inability to gain a road driver job." (App. p. A-44).

Having thus concluded that plaintiffs in all three cases (and apparently, the entire Texas-wide class in *Rodriguez* as well) have been discriminatorily denied road jobs in original hire, the Fifth Circuit then concluded that the contract seniority system, requiring that city drivers give up their city job bidding and lay-off seniority upon transfer to the road, effectively discouraged the transfer of city drivers to road positions and thus discriminatorily "locked-in" minority city drivers to their lower paying jobs. (App. p. A-47). Because union defendants¹¹ had participated in negotiations which resulted in the contract seniority system and because they had not provided for "seniority carryover . . . on a one-time-only basis for qualified minority city drivers who wished to transfer to the road," Southern Conference and Local 657 were held to have violated and thus liable under 42 U.S.C. §2000e-2 and 42 U.S.C. §1981. (App. p. 57).

¹¹ In *Herrera* and *Resendis* the International Brotherhood of Teamsters was found not to have violated Title VII, or 42 U.S.C. § 1981. See App. pp. A-77, 92. The International was not a party in *Rodriguez*.

REASONS FOR GRANTING THE WRIT

This Petition, like that in *International Brotherhood of Teamsters v. United States of America*, No. 75-636 (October Term 1975), presents questions of extraordinary importance. In the cases in which we seek review, the Fifth Circuit has summarily disregarded a landmark decision of this Court while writing opinions which are in irreconcilable conflict with the law in the Sixth Circuit; swept aside rules of evidence; and effectively nullified Section 3 of Title VII, which purports to recognize the legality of "bona fide seniority system(s)." In short, there exists compelling reason for granting this Writ.

I

The Fifth Circuit's Decisions Are in Substantial Conflict With Those of This Court and the Sixth Circuit.

We have noted that in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) the Court stated in the most precise language the proof required of a plaintiff in an individual Title VII case to make a prima facie showing of racial discrimination: that he made proper application and was qualified for a job in which a vacancy existed. Thus, in *McDonnell Douglas*, once an individual minority applicant proved that upon proper application, the existence of a job vacancy and undisputed qualifications, "(the employer) sought mechanics, respondent's trade, and continued to do so after respondent's rejection," a prima facie case of discrimination was made out. (*Ibid.*) But then, and only then, did the burden "shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." (*Ibid.*) While the Court recognized that "the facts necessarily will vary in Title VII cases and the specification of the above prima facie proof required from (the employer) is not necessarily applicable in every respect to differing factual situations,"

the Court did not suggest such a departure could be justified in simple cases involving individual claims of discrimination.

Herrera and *Resendis* are precisely such cases. The trial court there found that plaintiffs had made not one iota of proof in compliance with the *McDonnell Douglas* standards. On appeal, plaintiffs did not argue, and indeed did not even suggest that the trial court's factual findings in that regard were "clearly erroneous."¹² Absent a showing that the findings were "clearly erroneous," there is absolutely no basis for the Fifth Circuit's disregarding them.

What the Fifth Circuit did, as we have said above, is: (1) reclassify *Rodriguez* as a class action; (2) look to the racial composition of East Texas' road drivers; and (3) then use evidence as to supposed discrimination against the class by East Texas to dispose of the individual claims by different plaintiffs against different employers (Lee Way and Yellow Freight) in *Herrera* and *Resendis*.

The propriety, and indeed the logic in this exercise is nonexistent. Can such a callous disregard of the rules laid out in *McDonnell Douglas* and the uncontested evidentiary findings of the trial court in *Herrera* and *Resendis* be justified? This is, we submit, "one of those rare instances where to state the question is in effect to answer it." *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948).

Equally inexplicable is the Fifth Circuit's rejection of an important aspect of the holding in *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974). In *Thornton*, a class action, the Sixth Circuit nevertheless required that individuals prove both actual application for (or filing of an E.E.O.C.

¹² See Rule 52(a), Federal Rules of Civil Procedure; *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), reh. den. 333 U.S. 869 (1948).

charge) and wrongful denial of road employment as a prerequisite to an award of relief. In this respect, *Thornton* clearly applies *McDonnell Douglas* standards to a class action. But in *Rodriguez*, a case involving the same employer and identical contracts, the Fifth Circuit says that city employees have been discriminated against, and thus may transfer to road jobs taking their full city seniority with them, *not* based on any showing of whether the individual would have had a road job but for discrimination—but rather upon “whether he desires to transfer now.” *Thornton* and *Rodriguez* are in irreconcilable conflict.

II

The Fifth Circuit’s Refusal to Honor the Parties’ Evidentiary Stipulation at Trial.

Fully as extraordinary as its refusal to follow *McDonnell Douglas* was the Fifth Circuit’s determination that it would “accord no weight” to the parties’ trial stipulations that plaintiffs had not been discriminated against in their original employment as city drivers. The Fifth Circuit’s reason for doing so is obvious: a finding of discrimination against plaintiffs in their original employment as city drivers was absolutely necessary to a finding of lock-in discrimination. If plaintiffs were not discriminatorily placed in the city driver classification at the time of their hire, then seniority rules which applied equally to *all* city drivers, regardless of race, could not discriminatorily lock them in. This the Fifth Circuit acknowledged. (App. pp. A-42, 47).

The stipulations, as we have seen, matched precisely the evidence presented at trial. The three defendant employers had no road driver jobs in San Antonio when plaintiffs were originally hired there. Plaintiffs did not seek and were not denied road jobs at the time they were hired as city drivers. The Fifth

Circuit's refusal to honor this stipulation is simply the other side of the coin of its refusal to follow *McDonnell Douglas Corp.*

"The general rule is that stipulations entered into freely and fairly are not to be set aside except to avoid manifest injustice." *Fairway Construction Co. v. Allstate Modernization*, 495 F.2d 1077 (6th Cir. 1974).¹³ Where the stipulation merely matched the record evidence, the "injustice" in enforcing such a stipulation could scarcely be deemed "manifest." Or, as the Fifth Circuit itself stated in *Rodriguez* concerning defendants' stipulation to hiring statistics, "having stipulated to the statistics, the defendants cannot, of course, dispute them." (App. p. A-44).

The Fifth Circuit's focus on class-wide statistics as to road drivers in *Rodriguez* was its only means of avoiding the parties' stipulation and the matching record evidence that all of the plaintiffs in all three cases were not discriminatorily denied road jobs at their original hire. The eleventh hour resurrection of *Rodriguez* as a class action can only be viewed in that light.¹⁴

III

Legality of Contract Seniority Rules.

"Seniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore*, 375 U.S. 335 at 346-47 (1964). That is true in the cases at bar as to both city and road employees. The seniority rules at issue here affect hundreds of thousands of employees in the freight industry. And

¹³ Citing *Sherman v. United States*, 462 F.2d 577 (5th Cir. 1972); *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971).

¹⁴ Again, as to the propriety of the Fifth Circuit's finding *Rodriguez* a class action, we defer to East Texas Motor Freight's Petition.

Title VII litigation concerning those rules has proliferated beyond control,¹⁵ without final resolution. Thus the legality of the seniority system at issue, and the liability of union entities who negotiate and contract for it, presents a question with dimensions far beyond the instant case—one which must finally be resolved by this Court. A more compelling reason for granting this Writ can scarcely be imagined.

Here the Fifth Circuit found the contract seniority system and union defendants in violation of Title VII and 42 U.S.C. § 1981 because no specific contract provision entitled *all* minority city employees to transfer to road driving jobs taking with them their city job seniority. But trial evidence and stipulations as well demonstrate beyond cavil that not *all* minority city employees were discriminatorily denied road jobs. Surely, minority employees who have been discriminatorily denied road employment are entitled to "rightful place" seniority in the road bargaining unit—that seniority they would have had "but for" discrimination.¹⁶ By the same token, Anglo road drivers who possess road jobs and consequent seniority are entitled to maintain their seniority and job rights as against minority individuals who have *not* been discriminatorily denied road employment.

"Although Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act, it certainly did not desire to melt job qualifications having no racially discriminatory ingredient or controlling pre-Act antecedent. In light of Title VII's legislative history, ascribing such an

¹⁵ Nearly one hundred such cases are pending or have been decided by lower courts throughout the federal judiciary system. See Footnote 26 of *Petition of International Brotherhood of Teamsters, International Brotherhood of Teamsters v. United States* (No. 75-636, October Term 1975).

¹⁶ *Bing v. Roadway Express, Inc.*, 485 F.2d 441 at 450 (5th Cir. 1973).

altruistic yet impractical purpose to that legislative body would surely be erroneous—'reverse discrimination' of the most blatant sort." *United States v. Jacksonville Terminal, et al.*, 451 F.2d 418 at 445 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

By holding the seniority system and union defendants in violation of Title VII and 42 U.S.C. § 1981, solely because they do not make provision for *all* minority city employees to transfer to road driving jobs with their full city job seniority, the Fifth Circuit convicts both the system and unions for not engaging in the very "reverse discrimination" that the Fifth Circuit itself says Title VII prohibits!

The Fifth Circuit commits serious error when it holds this contract seniority system illegally discriminatory. That court's complaint—that the system doth not automatically provide for minority city employees to transfer to road jobs taking their full city seniority with them—is misplaced. In so holding, the Fifth Circuit says nothing more than that the seniority system does not *automatically* provide road bargaining unit seniority for those whom an employer has discriminatorily excluded from the bargaining unit. No seniority system can automatically provide seniority for individuals whom the employer excludes from it. This, the Fifth Circuit itself has recognized.¹⁷ But union defendants here have negotiated and contracted for a provision, in applicable collective bargaining agreements, prohibiting race or national origin discrimination.¹⁸

¹⁷ *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974) (cert. granted, No. 74-728); *Watkins v. Steel Workers*, 516 F.2d 41 (5th Cir. 1975).

¹⁸ The National Master Freight Agreement, part of the agreements covering city and road employees, provides at Article 38 as follows:
"The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms

Further, unions have consistently proposed that minority city employees who have been discriminatorily denied road employment be awarded the opportunity to transfer to the road, with job seniority in the road bargaining unit from the date they would have had road employment absent discrimination. No contract seniority system or union can do more than this.

This contract seniority system, providing job seniority for city and road employees upon their entry into the particular, separate bargaining unit, has legitimate, nondiscriminatory origins. It is the seniority system that both city and road employees desire. City jobs are not menial jobs. They pay well, and many employees, both minority and white, prefer them to road jobs. City jobs are not in a line of progression with road jobs. In sum, the seniority system here is wholly distinguishable from a plant, line-of-progression job classification seniority system which draws artificial distinctions within a single bargaining unit and locks minorities into the most menial, low paying jobs which no employee with any choice desires to fill.¹⁹ If there can be a "bona fide seniority system," which Title VII recognizes and purports to protect, the system in the cases at bar must be one.

For the foregoing reasons and those urged in *International Brotherhood of Teamsters v. United States of America* (No. 75-636, October Term 1975), this Court must resolve all question as to the legality of this seniority system at issue.

or conditions of employment because of such individual's race, color, religion, sex or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin."

¹⁹ See *Quarles v. Phillip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970).

IV

The Effect of the Employers' No-Transfer Rule.

Finally, the Fifth Circuit failed to give proper consideration to uncontradicted evidence that East Texas Motor Freight and Yellow Freight had and have "no transfer" rules prohibiting transfer between city and road classifications.²⁰ Where transfer between city and road is absolutely prohibited, a contract rule providing for loss of job seniority in one unit and assumption of job seniority in the other from the date of entry therein could not be a causal factor affecting transfer.

The compelling logic of the foregoing statement was readily apparent to the trial court and the Sixth Circuit in *Thornton v. East Texas Motor Freight*, *supra*. There, in a case involving precisely the same seniority rules, the trial court concluded that local union liability²¹ rested solely on the existence of East Texas' no transfer rule. Reviewing the evidence that the no transfer rule originated with the employer, was not a creature of collective bargaining and applied equally to all employees, regardless of race, the Sixth Circuit reversed the trial court and specifically found no violation of Title VII on the part of the local union defendant.

All of the afore-cited considerations, determinative of union liability in *Thornton*, are present in *Rodriguez* and *Herrera*. The Fifth Circuit's disregard of the obvious fact that under such circumstances contract seniority rules could have no causal effect, and its finding of Title VII and 42 U.S.C.

²⁰ East Texas relaxed its no transfer rule for one thirty-day period in 1972.

²¹ The International Brotherhood of Teamsters and Southern Conference of Teamsters were dismissed in *Thornton* upon jurisdictional grounds.

§ 1981 violation on the part of the union defendants is in direct conflict with *Thornton*. For this last reason, too, this Petition must be granted.

CONCLUSION

Wherefore, Writ of Certiorari should issue to review the judgments of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

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Certificate of Service

In accordance with the rules of the Court, true copies of the foregoing have been served upon the following counsel of record by placing same in the U. S. Mail with first class air mail postage prepaid on this 13th day of November, 1975:

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